THE HON'BLE SRI JUSTICE P.S.NARAYANA

WRIT PETITION No.16399 OF 2006

DATE:22.11.2007.

Between:

M/s. Mohan Enterprises, rep. by its
Managing Partner Mr.Peetani Sambaiah

...Petitioner.

AND

Andhra Bank, Narsapur Branch,
Narsapur rep. by its Branch Manager.

...Respondent.

THE HON'BLE SRI JUSTICE P.S.NARAYANA

WRIT PETITION No.16399 OF 2006

ORDER:

1. This Court issued *Rule nisi* on 19.06.2007.

2. Respondent filed the counter affidavit.

3. Heard Sri S.R.Sanku, the learned Counsel representing the writ petitioner and Sri Ch.Siva Reddy, the learned Counsel representing the respondent.

4. M/s.Mohan Enterprises represented by its Managing Partner filed the present writ petition as against the respondent-Andhra Bank, Narsapur Branch, Narsapur represented by its Branch Manager for a Writ of *Mandamus* declaring the action of the respondent bank in not returning its title deeds/documents furnished by the petitioner as security in respect of the open cash credit account, despite it's settlement and the satisfaction of the bank, as illegal and arbitrary, and consequently to direct the respondent-bank to forthwith return to the petitioner all its title deeds/documents furnished by the petitioner as security in respect of the said open cash credit account.

5. Sri S.R.Sanku, the learned Counsel representing the petitioner had taken this Court through the contents of the affidavit filed in support of the writ petition and also the stand taken by the respondent, banking institution, in the counter affidavit and would maintain that the said stand cannot be said to be s sustainable stand. The learned Counsel also placed strong reliance

K.JAGDISHWAR REDDY v. THE MANAGER, ANDHRA BANK, BADA BAZAR BRANCH, NIZAMABAD[1] and ***KRISHNA KISHORE KAR v. UNITED COMMERCIAL BANK AND ANOTHER***[2] and would maintain that in the facts and circumstances of the present case, it cannot be said that Section 171 of the Indian Contract Act, 1872 would be attracted. Ultimately, the learned Counsel would conclude that this stand taken by the banking institution is unsustainable stand and the writ petition to be allowed.

6. Per contra, Sri Ch.Siva Reddy, the learned Standing Counsel representing the respondent banking institution had placed strong reliance on the decision of this Court in ***K.SITA v. THE CORPORATION BANK***[3]. The learned Counsel also would contend that the decision JAGDISHWAR REDDY's case (1 supra) had been referred to by the learned Judge in K.SITA's case (3 supra). The learned Standing Counsel also pointed out that the bank's lien contemplated by Section 171 of the Indian contract Act, 1872 would be applicable. The Counsel also pointed out that the learned Judge in SITA's case (3 supra) in fact, had referred to the decision in ***SYNDICATE BANK v. VIJAY KUMAR***[4] and in the light of the subsequent decision, unless this Court is satisfied that two different learned Judges of this Court had expressed conflicting opinions, the matter need not be referred to a Division Bench, especially, in the light of the fact that in the subsequent decision, the learned Judge of this Court not only referred to JAGDISHWAR REDDY's case (1 supra), but further followed the view of the Apex Court in SYNDICATE BANK's case (4 supra).

7. Heard the Counsel.

8. The writ petitioner had availed open cash credit limit

of Rs.3,00,000/- and also availed agricultural term loan from the respondent-Andhra Bank, Narsapur Branch, Narsapur, represented by its Branch Manager. It is also stated that as per the open cash credit account, the respondent bank filed O.S.No.193 of 2004 against the petitioner for recovery of amount, since there arose certain disputes. However, the said suit was settled before the Lok Adalat and the petitioner paid the amount as settled before the Lok Adalat. Therefore, the petitioner requested for return of the title deeds. However, the bank refused to return the title deeds covered by O.S.NO.193 of 2004, on the ground that the writ petitioner owes another sum of Rs.23,491/- as on 31.12.2005. Further it is stated that the action of the respondent bank in retaining the title deeds of the petitioner is illegal and arbitrary. If the bank has any claims against the petitioner, the same can be resolved as it had resolved the earlier transactions, but the bank cannot retain the title deeds of the earlier account, despite its settlement, just on the ground that another account is yet to be settled. It is also stated that the matter was referred to Lok Adalat and the Lok Adalat vide its order, dated 04.03.2006, closed the issue on the ground that bank has lien on the property as the other loan has not been cleared. Therefore, even in the Lok Adalat, there could not be a settlement regarding return of the documents as it is the contention of the bank that it has got lien on the property despite the settlement of the cases, on the ground that the other loan transaction is yet to be settled. It is also stated that the documents ought to have been returned to the petitioner in respect of the case which had been already settled. The specific lien in respect of the settled account came to be over and bank cannot exercise its general lien in respect of the same property, despite the fact that the dispute regarding that property had been

settled and the bank can no longer exercise lien on the property as the dispute regarding that property was already over. In such circumstances, the present writ petition had been filed.

9. In the counter affidavit filed by the respondent it is averred in para 3 that the petitioner is a partnership firm represented by its Managing Partner Sri P.Sambaiah S/o.Late Suraiah, and the said firm availed cash credit facility of Rs.3,00,000/- from the respondent bank and executed the loan documents. The Managing Partner, Sri P.Sambaiah, has created mortgage by deposit of title deeds relating to his property towards the security for repayment of the above said facility. As the said firm failed to repay the amount due, this respondent-bank filed suit in O.S.No.193 of 2004 for recovery and the suit was settled by way of compromise before the Lok Adalat, Narsapur and the petitioner herein paid the compromise amount. As the cash credit loan account was discharged, the petitioner demanded for return of title deeds deposited with the bank. As Sri Sambaiah availed another loan from the respondent bank and failed to repay the amount due of Rs.23,491/- as on 31.12.2005, in spite of repeated demands, the respondent bank retained the title deeds under bank's general lien and advised the petitioner to pay the loan amount due and take back the title deeds.

10. Further it is stated in para 4 that the petitioner approached Lok Adalat, Narsapur in Pre Litigation Matter No.4 of 2006 against the decision of the bank in exercise of the banker's right of lien and the Lok Adalat, after hearing both parties, had closed the petition upholding the bank's right of general lien. It is also stated that the petitioner, instead of discharging the loan and taking back the title deeds, approached this Court by filing the present writ petition.

11. It is also stated that under Section 171 of the Indian Contract Act, 1872, the bankers have got right of lien on the goods held by the bank in the normal course of banking business unless there is contract to the contrary. The decision in SITA's case (3 supra) also had been referred to.

12. Certain submissions were made relating to the applicability of Section 171 of the Indian Contract Act, 1872 in relation to monetary transactions on the ground that such monetary transactions would not fall within the meaning of goods.

13. Section 174 of the Indian Contract Act, 1872 reads as under:

> "In the absence of a contract to that effect, the pawnee shall not retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged"

14. Section 171 of the Indian Contract Act, 1872 reads as hereunder:

> "171. General lien of bankers, factors, wharfingers, attorneys, and policy-brokers:- Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers, may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods failed to them, unless there is an express contract to that effect."

15. In SITA's case (3 supra), the learned Judge of this Court at pars 3 to 9 observed:

> The petitioner contends that when the ornaments have been pledged with the Bank against a specific loan the Bank cannot have a general lien so as to cover the other debts in view of Section 174 of the

Indian Contract Act (for short 'the Act'). In support of the said contention, strong reliance is placed by the learned Counsel for the petitioner on a decision of this Court in *Jagdishwar Reddy v. Manager, Andhra Bank,* 1988 (1) ALT 605.

On the other hand, it is the contention of the respondent Bank that it has a general lien under Section 171 of the Act and the fact that the jewels were pledged for raising a specific loan does not amount to a contract to the contrary. It is further contended that under Section 174 of the Act also, there is presumption in favour of the pawnee in respect of subsequent advances. It is finally contended that, in any case, the writ petition is not maintainable and the remedy of the petitioner, if at all, is to approach the Civil Court. In support of the above contentions, the learned Counsel for the respondent has placed reliance on the judgments reported in *Syndicate Bank v. Vijay Kumar,* A.I.R. 1992 S.C. 1066=I (1992) BC 324(SC), *Kunhan Mayan and Others v. The Bank of Madras,* (1986) I.L.R. (19) Madras 234. *N.T.P.C.Ltd. v. Bhanu Construction Co.P.Ltd.,* A.I.R. 1989 A.P. 140, and *Canara Bank v. Taraka Prabhu Publishers Pvt.Ltd.,* A.I.R.1991 A.P. 258. It is also submitted that the judgment in *Jagdishwar Reddy v. Manager, Andhra Bank,* (supra) must be deemed to be impliedly overruled by the judgment of the supreme Court in *Syndicate Bank v. Vijay Kumar,* (supra).

Section 171 of the Indian Contract Act deals with general lien of Bankers, Factors, Wharfingers, Attorneys and Policy-brokers. It provides that Bankers, Factors, Wharfingers, Attorney of a High Court and Policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to the effect. Sections 173 and 174 of the Act deal with the pawnee's right of retainer of the goods pledged.

Section 173 provides that the pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise but for interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged. Section 174 provides that the pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged, but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

It is the contention of the petitioner that the general lien under Section 171 is not available when there is a specific pledge which implies a contract to the contrary. This contention, no doubt, finds support from the decision in *Jagdishwar Reddy v. Manager, Andhra Bank,* (supra). The petitioner in that case obtained a loan of Rs,6,000/- pledging his gold ornaments with the respondent-Bank. He also stood surety along with another person for the loan obtained by a third party from the same Bank. When the petitioner sought to repay the loan taken by him and demanded return of the gold ornaments pledged, the respondent-Bank refused to return the gold ornaments unless and until the other loan for which he figures as a guarantor was also discharged. It was held that on payment of the loan contracted by the petitioner, the contract of bailment/pawn extinguishes and the bailee/pledgee/pawnee is divested of his special property in the goods and he has to return the goods to the bailor/pledger/pawner unless he has any other right to retain the goods under law. It was also held that when any deposit has been made for a special purpose, in a given circumstances, unless there is any contract to the contrary, it cannot be implied that the Bank has a general lien over the property deposited for a specific purpose and it was not open to the Bank to claim general lien over the gold ornaments pledged by the petitioner. The express contract was for discharge of personal debt of the petitioner alone. The action of the respondent-Bank in refusing to release the gold

ornaments on the petitioner's offer to pay his personal debt is clearly illegal. The petitioner was, therefore, held entitled to repay the said debt and claim return of the pledged gold ornaments. For reaching the said conclusion, the Court placed reliance on the judgment of the Delhi High Court in *Vijay Kumar v. Jullunder Body Builders,* A.I.R. 1981 Delhi 126. In the Delhi High Court case, a judgment-debtor deposited two fixed deposit receipts with the Bank for issuing a Bank-guarantee on his behalf in a pending execution proceeding. Subsequently the Bank-guarantee was, however, discharged. When the decree-holder sought to attach the fixed deposit receipts, which were in the hands of the Bank, the Bank raised objection for attachment contending that the Bank has a lien on the deposited receipts for the amounts due to it from the judgment-debtor and so the F.D.Rs. are not liable to attachment. The Delhi High Court negatived the contention of the Bank holding that as the fixed deposit receipts were given in connection with the Bank-guarantee only, the covering letter and the endorsement thereon relating to the Bank-guarantee would constitute a contract contrary to the general lien of the Bank and consequently the Bank has no lien over it and the decree-holder is not entitled to attach the fixed deposit receipts which belong to the judgment-debtor.

The judgment of the Delhi High Court, was, however, reversed by the Supreme Court in *Syndicate Bank v. Vijay Kumar,* (supra). The Supreme Court, on a perusal of the covering letters accompanying the F.D.Rs. in question, came to the conclusion that a general lien is created in favour of the appellant-Bank in respect of those two F.D.Rs. and the Bank is given the authority to retain the F.D.Rs. so long as any amount on any account is due to it from the judgment-debtor. The Supreme Court further held that merely because the two F.D.Rs. were also furnished as security for the issuance of the Bank-guarantee, the general lien thus created cannot come to an end when the Bank-guarantee is discharged. It was also held that merely because on the basis of the security of the

two F.D.Rs., the appellant-Bank gave a guarantee, it cannot be said that the Banker had only a limited particular lien and not a general lien on the two F.D.Rs. In its judgment, the Supreme Court, after referring to several treatises like Halsbury's Laws of England, Chitty on Contract, Paget's Law of Banking, etc., explained the meaning and scope of the expression "Banker's lien." The Supreme Court also quoted with approval the following extract from *Brandao v. Barnett,* (1846) 12 Cl & Fin.787:

> "Bankers most undoubtedly have a general lien on all securities deposited with them as Bankers by a customer, unless there be an express contract, or circumstance that shows an implied contract, inconsistent with lien."

I n *Kunhan Mayan and Others v. The Bank of Madras,* (supra), a Division Bench of the Madras High Court had to deal with a case where the plaintiff deposited certain jewel with the defendant-Bank to secure certain debts. Afterwards he paid the secured debts and demanded the return of the jewels while being otherwise indebted to the Bank. It was held that the plaintiff was not entitled to recover the jewels without discharging the other debts unless he proved that the defendant agreed to give up the general lien. The Court held as follows:

> "The rule of law with regard to general liens is clearly laid down in the 171st Section of the Contract Act. Bankers have such a lien on things bailed with them unless there is a contract to the contrary. It was for the plaintiff in this case to prove the existence of such contract……..It being incumbent of the plaintiff to show that the Bank had agreed to give up the general lien to which by law a Bank is *prima facie entitled,* I must say that in my opinion the plaintiff has failed in his proof."

Another decision of the Madras High Court in *Official Agency, Madras v. Ramaswamy,* ILR (43) Mad.147=A.I.R.1920 Mad.64, is also to the same effect. These judgments of the Madras High Court, which are binding precedents, have not been noticed by the learned single Judge in *Jagdishwar Reddy v. Manager, Andhra Bank,* (supra). That apart, the learned Judge failed to note or consider the effect of the latter part of Section 174 of the Contract Act which contains the following crucial words:

> "But such contract, in the absence of anything to the contrary, shall presumed in regard to subsequent advances made by the pawnee."

These words clearly mean that in the absence of anything to the contrary, it must be presumed that the pawnee has a right to retain the goods pledged with him to recover the subsequent advances made by him to the pawner. It is not the case of the petitioner in the instant case that there was any such contract to the contrary displacing the presumption available under latter part of Section 174 or the right of general lien available under Section 171 of the Contract Act. It must, therefore, be held that the decision in *Jagadishwar Reddy's* case (supra) does not lay down the law correctly and it must be deemed impliedly overruled. It may also be mentioned that this decision was not approved and was specifically dissented from by a Division Bench on another point (with regard to the maintainability of the writ petition). In *N.T.P.C.Ltd. v. Bhanu Construction Co.B.Ltd.* (supra), the Division Bench held that the observations made by the learned Judge on the said point must be treated as obiter.

In *State Bank of India, Kanpur v. Deepak Malviya,* A.I.R. 1996 All.165, learned Single Judge of the Allahabad High Court, after considering various precedents including the decision of the Supreme Court in *Syndicate Bank v. Vijay Kumar, (*supra), *Kundan v. Bank of Madras,* (1986) ILR 19 234, and also the decision in *Jagdishwar Reddy v. Manager, Andhra Bank,* (supra), held that pledge is only a form of bailment and all pledges are bailment. The Banker's

> lien contemplated by Section 171 as such is specific provision relating to Banker's lien and has an overriding effect on general provisions of Section 174 which provide for relationship of pawnee and pawner in respect of pledged goods. The Banker's lien will carry over to such pledges and Bank can retain pledged goods, if the debtor had not cleared his amount in connection with another loan.

16. In the above decision, the decision of the learned Judge of this Court in ***JAGDISHWAR REDDY***'s case (1 supra) also had been referred to, wherein the learned Judge of this Court also had referred to **TRUSTEES, PORT OF BOMBAY v. PREMIER AUTOMOBILES LTD**[5], **LALAN PRASAD v. RAHMAT ALI**[6], ***ELLIS & Co's TRUSTEE v. DIXON JOHNSON***[7]***, VIJAY KUMAR v. JULLUNDER BODY BUILDERS***[8]***,*** and ***RADHA RAMAN v. CHOTA NAGPUR BANKING ASSOCIATION***[9] and also relevant passages from the authoritative texts and ultimately observed at para 18:

> Considered from the above perspective, I have no hesitation to conclude that by operation of Sec.171, unless there is an intention expressed contrary to the contract, the bank has a general lien over the securities belonging to the debtor that come into its hands, and if the money is in its hands as the general account, it has a right to set-off; but when any deposit has been made for a special purpose, in a given circumstance, unless there is any contract to the contrary, it cannot be implied that the bank has a general lien over the specified security deposit for a specified purpose. Indisputably there is no contract offering to take the gold ornaments pawned by the petitioner as a pawn for the debt due and payable by the petitioner as a surety of Mr. Santosh Reddy. Therefore, it is not open to the bank to claim general

> lien over the gold ornaments pawned by the petitioner. The express contract was for discharge of personal debt of the petitioner alone. Thus, the action of the respondent in refusing to release the gold ornaments on petitioner's offer to pay the personal principal debt of Rs.6,000/- and interest accrued thereon, is clearly illegal. The respondents are directed to release from the pawn of the gold ornaments on the petitioner's redeeming the debt of Rs.6,000/- and interest accrued thereon….."

17. Strong reliance was placed on the decision of Calcutta High Court in ***KRISHNA KISHORE KAR****'s case* (2 supra), wherein at paras 20 and 21, the learned Judge of Calcutta High Court observed:

> "For this principle, we need not look into the English cases as S.171 of the Contract Act itself clearly lays down that the provisions of this section will apply only in absence of the express contract to the contrary. Therefore, in the present case the defendant Bank cannot exercise any general lien under S.171 of the Contract Act in view of the existence of the Counter guarantee dated 27-11-1962. I accept this submission on behalf of the plaintiff and hold that the bank was not entitled to appropriate or adjust its claims under Section 171 of the Contract Act.
>
> The Bank further alleged that there was a balance amount of Rs.34,523.63 p. outstanding in the plaintiff's cash credit account with the defendant Bank. The plaintiff had pledged fix deposit receipts by way of security against overdraft and had agreed that on maturity, the proceeds of the fixed deposits would be credited in the overdraft account to liquidate plaintiff's liability. In the written statement the defendant Bank alleged that after crediting the proceeds of the fixed deposits, a sum of Rs.19,787.32 remained due and payable by the plaintiff in the overdraft account which amount was also adjusted against Rs.93,500/- and the

account was closed on 1-2-1964. A statement of account was annexed to the written statement which is Ext.I in the suit. The plaintiff disputed the correctness of this account in his testimony. Bank's witness Suresh Chandra Roy Chowdhury proved the security ledger entries relating to the fixed deposits of the plaintiff as well as the cash credit ledger entries relating to the account of Isis Coal Company. He also proved the correctness of the contents of Ext.I. This witness stated that these books were kept under his supervision and he had personal knowledge regarding the entries. This witness was not at all cross-examined on his evidence of correctness of the entries in the cash credit ledger or Ext.I. It was suggested to him in cross-examination that entries at page 80 of the security ledger were not correct but plaintiff failed to prove incorrectness of any entry at page 80 of the security ledger either in cross-examination of Roy Chowdhury or through his own witness. It is the case of the plaintiff that he never received statement of account from the defendant Bank. But the two branch managers of the new Market Branch. Mr.N.K.Bhatacharjee and Mr.D.Ghosh as well as two of its employees Bijoy Krishna Chowdhury and Suresh Roy Chowdhury all in their respective testimony said that plaintiff's office was very nearer to this branch office and the plaintiff often used to come to check his account and under the instruction of these two branch managers, these two employees used to personally hand over the statements of accounts to him. The usual Banking practice was that against delivery of statements of account personally to the customer no receipt was taken. It appears from the statement of account Ext.I that on or about 5-6-1963, the plaintiff paid Rs.11,885.34 by cheque No.688756 to the Bank for liquidation of his liability in the said over draft account. This is corroborated by the counter foil of the cheque produced by the plaintiff being Ext.I, in the suit. Normally such payment would not be made unless the party paying was aware of the accounting position. Moreover it also appears that the Bank credited the proceeds of the fixed deposits in the cash credit

account and duly informed the plaintiff about the same by its letter dated 21-2-1964. By this letter the plaintiff was also informed that after giving credit of the fixed deposits the Bank had adjusted the outstanding dues of Rs.19,787.32 by appropriating the equivalent amount from Rs.93,500/- in terms of order dated 1-7-1963 (Ext.A page 51). The plaintiff did not reply to this letter. It appears from the evidence on record that after adjustment of the aforesaid sums the cash credit account was closed by the Bank on 21-2-1964. The present suit was instituted by the plaintiff on 1-8-1966. At the time of filing of the suit the plaintiff was fully aware as to how the Bank had adjusted this Cash Credit account and what was the alleged liability of the plaintiff in this account. But in the present suit, the plaintiff did not challenge these allegations of the defendant Bank nor the adjustment made by it in respect to the same. The plaintiff's alleged liability in the cash credit account, Bank's adjustment by crediting the fixed deposit proceeds as well as setting of the balance outstanding against Rs.93,500/- all remained unchallenged by the plaintiff in spite of his full knowledge of these facts as far back as on 21-2-1964. If there was any doubt in plaintiff's mind regarding the correctness of this account, the plaintiff would have challenged this account in this present suit because the plaintiff was fully aware of what would be the banks' defence in the present suit. On the facts and circumstances of this case, I have no hesitation to accept the testimony of the Bank's witness Roy Chowdhury that the entries in the cash credit ledger, security ledger and Ext.I are all correct. Now, the question would be, could the Bank adjust the balance of Rs.19,787.32 in the cash credit account by appropriating the same amount from Rs.93,500/- which was lying in a separate account with the Bank? There was no express contract between the plaintiff and the defendant Bank regarding the manner of adjustment of this outstanding balance in the cash credit account. All the proceeds of the fixed deposits had been duly credited in this account. Therefore the Bank could exercise its general lien under S.171 of the Contract Act for making up the loss caused by the

plaintiff and the Bank had rightly adjusted this claim against Rs.93,500/- set free by order dated 1-7-1963.

18. It is no doubt true that except where other binding precedents of Division Bench, Full Bench or Larger Bench or that of the Apex Court are to be followed, when a learned Judge differs from the opinion of another learned Judge, it would be always desirable to refer the matter to an appropriate Bench to invite an authoritative pronouncement. The learned Judge in *JAGDISHWAR REDDY's* case (1 supra) at para 7 specifically referred to the judgment of the Delhi High Court in ***VIJAY KUMAR***'s case (8 supra). The Apex Court while reversing the said decision, in ***SYNDICATE BANK***'s case (4 supra) observed at paras 5, 7, 8, 10 and 16 as hereunder:

> "The two FDRs were duly discharged by signing on the reverse of each of them by the judgment-debtor and were handed over along with the covering letters on the Bank's usual printed forms on 17-9-80 at the time of obtaining the guarantee. The relevant clause of the letter reads as under
>
> > 'The Bank is at liberty to adjust from the proceeds covered by the aforesaid Deposit Receipt/ Certificate or from proceeds of other receipts/certificates issued in renewal thereof at any time without any reference to us, to the said loan/ OD account.'
>
> We agree that the above deposit and renewals shall remain with the Bank so long as any amount on any account is due to the Bank from us for the said M/s. Jullundur Body Builders singly or jointly with others.
>
> To the same effect is the other letter. The above recital in the letter clearly goes to show that a general lien is created in favour of the appellant-Bank in respect of those two FDRS. The Bank is given the authority to retain the FDRs so long as any amount on any account is due from the judgment-debtor. Thus

the appellant-Bank had a right to set off in respect of these FDRs if there was a liability of the judgment-debtor due to the Bank. In this context it is useful to refer to some passages in the text-books on the scope and meaning of the expression "Banker's lien".

“Applying these principles to the case before us we are of the view that undoubtedly the appellant-Bank has a lien over the two FDRS. In any event the two letters executed by the judgment-debtor on 17-9-80 created a general lien in favour of the appellant-Bank over the two FDRS. Even otherwise having regard to the mercantile custom as judicially recognised the Banker has such a general lien over all forms of deposits or securities made by or on behalf of the customer in the ordinary course of banking business. The recital in the two letters clearly creates a general lien without giving any room whatsoever for any controversy.

The High Court, however, found that the two FDRs were given only by way of securities for the Bank guarantee and when once the guarantee is discharged, the amounts covered by the said two FDRs would belong to the judgment-debtor since the charge is limited to the amount of the Bank guarantee. The High Court, in this context relied on the words "Lien to BG 11 / 80" which are found on the back of each FDRs and according to the High Court in view of this endorsement, the Bank has no right to hold the security in their own favour after the Bank guarantee has been released and they are bound to return it to the customer namely the judgment-debtor when he makes a demand on the Bank. The High Court also observed that the terms of the contract namely furnishing FDRs as security for the Bank guarantee are inconsistent with the general lien that the bank claims and the Bank can claim only a particular lien for the Bank guarantee. It also observed that since the Bank guarantee has been discharged, the Bank has no right to hold the security for something more than what was agreed upon. We are unable to agree with the reasoning. As already noticed, the recital in the

covering letters as extracted above clearly established that a general lien was created in favour of the Bank on the two FDRS. Merely because the two FDRs were also furnished as security for the issuance of the Bank guarantee, the general lien thus created cannot come to an end when the Bank guarantee is discharged. The words "Lien to BG 11 180" do not make any difference.

10. It is in common parlance that the issuance of guarantee is what that a guarantor creates to discharge liability when the principal debtor fails in his duty and guarantee is in the nature of collateral agreement to answer for the debt. It is well settled that the Bank guarantee is an autonomous contract and imposes an absolute obligation on the Bank to fulfil the terms and the payment in the Bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable.

We have already held that the appellant-Bank has a general lien over those two FDRS. The High Court having held that the two FDRs can be attached gave a further direction dismissing the objection of the Bank that the Bank should deposit an amount of Rs. 35,000/-. As rightly contended by the learned counsel for the appellant-Bank, the Bank in the instant case has the liberty to adjust from the proceeds of the two FDRs towards the dues to the Bank and if there is any balance left that will only be the amount which would belong to the depositor namely the judgment-debtor in this case and only such amount, if any, can be attached in discharge of a decree. It is also submitted that the liability of the judgment-debtor to the appellant-Bank was far in excess of the amounts covered by the two FDRs and therefore nothing is due from the Bank to the judgment-debtor. This is a matter for verification. However, in the view taken by us above namely that the Bank has a general lien over the two FDRs we set aside the order of the High Court directing the appellant-Bank to deposit an amount of Rs. 35,000/-. The Hi h Court shall, however, consider the objections

raised by the Bank, namely that no amounts are due to the judgment-debtor, in the light of the above principles laid down by us and then decide whether there is any amount left for being attached by the decreeholder in execution of his decree. With the above directions the appeal is accordingly allowed. In the circumstances of the case, there will be no order as to costs.

Appeal allowed"

19. In the light of the reasons which had been recorded in detail by the learned Judge in SITA's case (3 supra) and also the binding decisions refereed to in the said judgment by the learned Judge of this Court, this Court is satisfied that the said view requires no reconsideration at the hands of this Court and inasmuch as the same is a binding precedent, the writ petition is liable to be dismissed as being devoid of merits and accordingly, the same shall stand dismissed, but however, in the facts and circumstances without costs.

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JUSTICE P.S.NARAYANA.

Date:22.11.2007.

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Note: LR Copy to be marked.

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[1] 1988 (1) ALT 605

[2] AIR 1982 CALCUTTA 62

[3] I (2000) BC 199

[4] AIR 1992 SC 1066 = I (1992) BC 324 (SC)

[5] AIR 1981 S.C. 1882

[6] AIR 1967 SC 1322

[7] 1925 A.C. 489

[8] AIR 1981 Delhi 126

[9] AIR 1944 Patna 368